

MEMORANDUM OF LAW

DATE: March 30, 1990

TO: Robert Bartosh, Legislative Analyst,
Intergovernmental Relations Department

FROM: City Attorney

SUBJECT: Applicability of Brown Act Notice and Agenda
Requirements to Committees of Council/Senate
Bill 1853

By telephone on March 26, 1990, you asked the City Attorney whether existing notice and agenda provisions of the Ralph M. Brown Act or Council Policy 000-16 applied to ad hoc committees of the City Council. Your questions arose in light of comments the City Attorney recently made regarding Senate Bill 1853, and the fact that the Council has recently created two (2) committees comprising less than a quorum of councilmembers, one committee to examine various charter review, campaign and election reform measures ("Ballot Measure Committee") and the other to examine the budget ("Budget Review Committee").

Because of the importance of the questions raised, we offer this opinion in writing with copies to the Mayor and City Council as well as to the City Clerk.

BACKGROUND

On February 7, 1990, the City Council Committee on Rules, Legislation and Intergovernmental Relations ("Rules Committee"), authorized Mayor Maureen O'Connor, Deputy Mayor Abbe Wolfsheimer, Councilmember Linda Bernhardt, the City Attorney and the City Clerk to convene for the purpose of determining a potential package of ballot proposals (on the topics of charter amendments, campaign financing, election reform and ethics), schedule and process for the November 1990 (or sooner) ballot.

In a special meeting held on March 7, 1990, the City Council by common consent approved a Budget Review Committee appointed by the Mayor consisting of four (4) Councilmembers: Bob Filner, Bruce Henderson, Wes Pratt and Ron Roberts.

On or about February 12, 1990, the Intergovernmental Relations Department asked the City Attorney to review and analyze Senate Bill 1853. This bill, if adopted, would expand

the sweep of the Ralph M. Brown Act to require notices and published agendas of meetings of an advisory body or task force when only one (1) member of a local governing body such as the City Council serves on that advisory body or task force.

ANALYSIS

I. Ralph M. Brown Act.

Generally, the Ralph M. Brown Act ("Brown Act") requires local legislative bodies to give notice and publish agendas of their meetings, which are to be held in public with an opportunity for public comment. Government Code section 54950 et seq.

The term "local legislative body" clearly includes city councils. It also includes committees made up of members of the city council when those committees comprise a quorum of city councilmembers.¹ For example, The City of San Diego's standing committees, such as the Rules Committee and the Transportation and Land Use Committee, must comply with the Brown Act because they comprise a quorum of councilmembers (five (5) or more).

Although not at issue here, it is worth noting what types of gatherings constitute "meetings" within the meaning of the Brown Act, thus triggering the notice, agenda and public comment requirements. The term "meeting" is not defined by the statute. Generally, however, by virtue of interpretation provided by the courts, the Attorney General, and legal scholars, the term is understood to mean "a gathering of a quorum of the legislative body, no matter how informal, where business is discussed or transacted." (Open Meeting Laws, California Attorney General's Office (1989), at 15, citing 61 Op. Cal. Att'y Gen. 220 (1978).)

¹The term "local legislative body" also includes certain city boards and commissions when they are created by formal action of the city, e.g., by charter, ordinance or resolution. Government Code sections 54952.3; 54952.5. The discussion here, however, focuses only on the city council and its committees or subcommittees.

A. "Less-than-a-quorum" exception.

As noted above, meetings held by a quorum of a local legislative body, including committees made up of a quorum or more of the San Diego City Council, must comply with the Brown Act.

The current statutory scheme expressly recognizes an exception, however, for groups made up of less than a quorum of a local legislative body. Government Code section 54952.3. Absent special circumstances, notice and published agendas of meetings of this type of group are not required by the Brown Act. This is

known as the "less-than-a-quorum" exception to the Brown Act.

Under the facts as presented in this memorandum, neither the Ballot Measure Committee nor the Budget Review Committee is required to publish notices and agendas of their meetings under the terms of the Brown Act, because these two (2) committees are made up of less than a quorum of councilmembers. This exception may not apply, however, if special circumstances exist, namely, if these committees engage in what are known as seriatim or serial meetings. This special circumstance is discussed below.

B. Serial meetings.

If a series of meetings are held, each of which technically comprise less than a quorum of a legislative body, but which taken as a whole, involve a majority of the legislative body's members, then the "less-than-a-quorum" exception does not apply. Open Meeting Laws, California Attorney General's Office (1989), at 19. As the Attorney General has said in a recent publication:

The problems arise when systematic communication begins to occur, which involves members of the board [local governing body] in acquiring information for an upcoming meeting or engaging upon debate, discussion, lobbying, or any other aspect of the deliberative process either among themselves or with staff. For example, executive officers frequently wish to brief their members concerning policy decisions and background events involved in proposed agenda items. Based on the principles of the Stockton Newspapers, Inc. [full citation omitted] case, and our [the Attorney General's] opinions, we believe that

a court would conclude that such communications violate the open meeting laws, because such briefings and discussions are a part of the deliberative process. If these communications are permitted to occur in private, a large part of the process by which the members reach their decisions have [sic] occurred outside of the public eye. In this way, the public is able only to witness the shorthand version of the deliberative process, and its ability to contribute or monitor the decision-making process is curtailed.

. . . .

Restrictions on serial meetings forbid members

of bodies from discussing matters of official business amongst themselves and from orchestrating, agreeing or cooperating as a group to meet with any individuals or groups without providing notice to the public so they may attend.

Open Meeting Laws, California Attorney General's Office (1989), at 19.

As established above, both the Ballot Measure and Budget Review Committees comprise less than a quorum of the City Council. Therefore, to preserve the "less-than-a-quorum" exception, both committees must avoid any serial or systematic contacts with other councilmembers or their staff regarding the subject matters of the respective committees. As the court was quick to point out in *Stockton Newspapers, Inc. v. Redevelopment Agency*, 171 Cal. App. 3d 95, 103 (1985):

Thus a series of nonpublic contacts at which a quorum of a legislative body is lacking at any given time is proscribed by the Brown Act if the contacts are "planned by or held with the collective concurrence of a quorum of the body to privately discuss the public's business" either directly or indirectly through the agency of a nonmember. (Emphasis added.)

C. Effect of Senate Bill 1853.

Senate Bill 1853, if adopted as drafted, would amend the Brown Act by adding section 54952.1 to the Government Code. It would define the term "official capacity" to include service by one or members of a legislative body on any advisory board or task force which is responsible for formulating legislation to be considered by that legislative body. In essence, this bill would eliminate the "less-than-a-quorum" exception for many types of advisory bodies and task forces currently exempted by the Brown Act. Depending on whether the Ballot Measure and Budget Review Committees "formulate legislation" for the full Council, this bill would, if enacted, change the result reached here as to the applicability of the Brown Act to these two (2) council committees.

II. Council Policy 000-16.

The City Council has adopted an "open meetings" policy, which is patterned after but broader than the Brown Act. It governs the "various city boards, commissions and committees." (Council Policy 000-16.) A copy of that policy is attached for your reference. The relevant portion is quoted below:

1. It is the policy of the City Council that all business conducted by City-appointed boards, commissions and corporations, or by committees thereof, be in full view of the public and news media . . . except for matters dealing with personnel, litigation, or threats to security of public buildings or to access to public services or facilities.

Although we have concluded above that committees comprising less than a quorum of City councilmembers need not comply with the Brown Act's notice and agenda requirements under the terms of the Brown Act itself, we interpret the above-quoted language to mean that, as a matter of policy, the Council of The City of San Diego has decided to broaden the Brown Act requirements to apply to all city boards, commissions corporations and committees thereof.

Arguably, this quoted language does not apply to committees of the Council itself, but rather only to those other bodies appointed or created by the Council that do not have members that are also City councilmembers. The purpose and background of the policy states that the policy is to apply to the various city

boards, commissions, and committees. Committees of the City Council, even those comprising less than a quorum of councilmembers, are not clearly excluded from the policy. Moreover, it is hardly credible that the Council would desire openness of its citizen committees yet exempt itself from the same principle.

Even though, as we point out above, Council Policy 000-16 is ambiguous in its application to committees made up of less than a quorum of councilmembers, out of an abundance of caution, we advise that the Ballot Measure and Budget Review Committees should provide notice and published agendas to comply with Council Policy 000-16. Alternatively, the Council by resolution could waive application of Council Policy 000-16 as to these two (2) committees.

CONCLUSION

The Brown Act by its own terms does not require the Ballot Measure Committee and the Budget Review Committee to publish notices and agendas of their meetings, because these committees are made up of less than a quorum of City councilmembers. Nonetheless, The City of San Diego's broader Council Policy 000-16 applies Brown Act provisions and constraints to these two (2) committees. Therefore, we opine that these committees either

publish notices and agendas of their meetings or obtain a resolution from the Council waiving the policy as to these two (2) committees.

JOHN W. WITT, City Attorney
Cristie C. McGuire
Deputy City Attorney

CCM:jrl:072:(x043.2)

Attachment

cc Mayor Maureen O'Connor

City Councilmembers

City Clerk

ML-90-45